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News re Alasaad border case

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Thanks! How's it going? Here are some initial thoughts.

The status quo had been that DHS and ICE basically searched devices of people when they entered the United States even if people objected. After this decision, I think it is more difficult for the government to do that. However, this decision is just binding in this case and has no precedential authority. It is likely that the government will appeal to the First Circuit Court of Appeals. Moreover, district court decisions like this one are not binding on other federal courts, trial or appellate, but can be cited as persuasive authority.

The CBP and ICE policies regarding such searches are declared to “violate the Fourth Amendment to the extent that the policies do not require reasonable suspicion that the devices contain contraband for both such classes of non-cursory searches and/or seizure of electronic devices.” In other words, the district court here is arguing that the policies applied by the government are unconstitutional because the government must establish that its agents have at least reasonable suspicion in order to search cell phones at border entries. That is a lesser standard than the standard enunciated by the Supreme Court in *Riley v. California*, holding that a search of a cell phone required probable cause.

Searches at the border typically have been treated differently by the Supreme Court. For example, in *United States v. Flores-Montano*, the Court addressed a search of a vehicle at a California border checkpoint. Specifically, Manuel Flores-Montano entered the United States at the Otay Mesa Port of Entry in California when a customs official inspected his vehicle. The agent sent Flores-Montano's car to a secondary inspection station. The gas tank sounded solid when tapped, so another agent called a mechanic to remove the tank. It took less than an hour to remove the gas tank. Inside, the agent found 37 kilograms of marijuana. Flores-Montano was charged for possession with intent to distribute. He filed a motion to suppress arguing that the agents lacked any reasonable suspicion. The Court analyzed whether a border patrol agent who removes and searches a car's gas tank without reasonable suspicion violates the Fourth Amendment. Ultimately, the Court determined that the government had authority to inspect a car's fuel tank at a border control checkpoint without any suspicion. While the Fourth Amendment “protects property as well as privacy,” interference with a car's gas tank “is justified by the Government's paramount interest in protecting the border.” The Court rejected Flores-Montano's assertion that requiring reasonable suspicion for searches of cars was unconstitutional, explaining that “[c]omplex balancing tests ... have no place in border searches of vehicles.” First, cars at the border are subject to search. There is less of a privacy interest in the gas tank than the passenger compartment. Second, the infringement of property rights is outweighed by the government's interests in controlling its borders. In addition, a 1 to 2 hour delay associated with a gas tank inspection is reasonable. Thus, reasonable suspicion was not even necessary to conduct a search like this one at the border.

In another notable case, *United States v. Montoya-Hernandez*, the Supreme Court addressed a body search at an international border entry. Specifically, Rose Montoya-Hernandez flew into the United States from Colombia. Customs officials questioned her about the number of trips she had made into the United States. They did not believe her story that she had come into the United States with no hotel reservation, appointments, checks, or credit cards so she could purchase items to sell in Colombia. Customs officials performed a pat-down and strip search finding that she was wearing two pairs of underwear and her stomach was firm. They detained her on suspicion of smuggling drugs. She told custom officials that she

was pregnant. When given the chance to have an x-ray to confirm this, she declined. A magistrate judge issued an order authorizing a rectal exam and an x-ray. A doctor performing this rectal exam discovered a balloon with cocaine. She was then arrested. Montoya-Hernandez then passed several balloons filled with cocaine that she had ingested. Ultimately, over several days, she passed 88 balloons totaling over one pound of cocaine. The Court addressed whether customs officials may engage in intrusive searches of people entering the country consistent with the Fourth Amendment. The Court determined that detaining an individual at a border is justified if customs officials reasonably suspect that the person is smuggling illegal drugs in their body. Here, customs officials had reasonable suspicion. Based on how she secreted the drugs in her body, Montoya-Hernandez's detention was not unconstitutionally too long. In *Montoya-Hernandez*, reasonable suspicion was necessary because customs officials were detaining her. The Court indicated that reasonable suspicion was appropriate in alimentary canal cases because there would rarely be probable cause. The standard is appropriate to "balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause." Here, her story, her actions, and her physical condition established reasonable suspicion.

These two Supreme Court cases along with the *Alasaad* decision establish that border entries receive less Fourth Amendment protections, but they do not receive no protection ever. Thus, an intrusive body search must meet reasonable suspicion at the border. Similarly, the search of a cell phone, which the Supreme Court characterized as a mini computer in *Riley* also must be done pursuant to at least reasonable suspicion at the border.

Moreover, the district court determined that "non-cursory searches and/or seizures of Plaintiffs' electronic devices, without reasonable suspicion, violated the Fourth Amendment." Here, the district court is essentially finding that the individual plaintiffs involved here had their Fourth Amendment rights violated as there was no reasonable suspicion.

I think that going forward, the government would be wise to ensure that it had reasonable suspicion for any cell phones it searched at border entries whether in Boston or the Rio Grande Valley. If it does not have reasonable suspicion, the government risks having a similar decision as the one issued here. Any such plaintiffs around the country would be citing *Alasaad* as persuasive authority. Any court inclined to rule in similarly situated litigants would cite to it. Any court inclined to rule for the government would likely have to discuss it and distinguish its applicability to the facts presented in the subsequent case.

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